

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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3 19-CV-893 (LDH)
4 HALL, et al., United States Courthouse
5 Plaintiff, Brooklyn, New York
6 - versus - September 12, 2019
7 NASSAU COUNTY, et al., 10:00 a.m.
8 Defendants.

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10 TRANSCRIPT OF CIVIL CAUSE FOR PREMOTION CONFERENCE
11 BEFORE THE HONORABLE LASHANN DEARCY HALL
12 UNITED STATES DISTRICT JUDGE

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1 (In open court.)

2 THE COURTROOM DEPUTY: All Rise. Case 19-CV-893,
3 Hall V. Nassau County.

4 MR. McNEELA: Andrew McNeela from Kirby McInerney,
5 representing the plaintiffs. And I'm joined by partner, David
6 Bishop and my colleague, Seth Shapiro.

7 THE COURT: Good morning.

8 MS. CALCATERRA: Good morning, your Honor, Regina
9 Calcaterra from Wolf Haldenstein Adler Freeman & Herz,
10 representing the defendants, Nassau County, and two of its
11 municipal entities, the Department of Assessment and the
12 Assessment Review Commission. I'm joined here by my two
13 colleagues, Dan Tepper, partner, and our associate Veronica
14 Bosco.

15 THE COURT: Good morning to you all. I'll start by
16 apologizing for the late start.

17 We're here for a premotion conference in connection
18 with the defendants' proposed motion to dismiss this complaint
19 which relates to a tax scheme.

20 As I understand it, certainly you all can correct me
21 if I'm wrong, in this case historically there was a tax scheme
22 that was once deemed to be discriminatory. A consent decree
23 was put in place. Pursuant to that consent decree certain
24 remedies were made to the tax scheme, which were deemed to
25 remedy the issues with respect to the discriminatory impact of

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1 the scheme. That scheme was then changed, I guess in recent
2 years, and now the plaintiffs maintain that the scheme has now
3 reverted back to one which has a discriminatory impact on
4 people of color based on the fact that those people are less
5 wealthy than their white counterparts in the county.

6 That's in broad strokes.

7 MR. McNEELA: Correct.

8 THE COURT: The defendants in this case, as I
9 understand it, are arguing that this Court is without the
10 authority to the entertain this claim for lack of subject
11 matter jurisdiction.

12 MS. CALCATERRA: Yes, your Honor.

13 THE COURT: I'll hear from you.

14 MS. CALCATERRA: Thank you, your Honor. The three
15 defendants that I represent is the county and two entities.
16 One of them is the Department of Assessment, that actually
17 determines what the tax assessment is for homeowner properties
18 in Nassau County which are deemed a term called class one
19 residential, but we'll call them home owner properties.

20 A homeowner who is appealing their taxes, they file
21 an appeal with the Assessment Review Commission, the third
22 defendant.

23 How you characterized this complaint is accurate.
24 And the plaintiffs are alleging that on behalf of the punitive
25 class that Nassau County's practices and grievance process

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1 violates the Fair Housing Act and the due process and equal
2 protection rights, based upon the conduct that you have just
3 described.

4 And please note that the defendants deny any
5 wrongdoing in relation to the complaint.

6 THE COURT: I'm curious, this is just out of
7 curiosity, is the tax scheme that's in place now, this
8 obviously is not a subject matter jurisdiction question, is
9 the tax scheme in place now reminiscent of the tax scheme that
10 was previously deemed to be discriminatory?

11 MS. CALCATERRA: Well, I think better to refer to
12 the tax streak that they refer to during 2010-2017 because
13 there is a new administration in. They changed -- moved to
14 change the tax scheme to where it's more equitable than it was
15 in the past to every homeowner.

16 THE COURT: The tax scheme that was in place from
17 2010 to 2017 about which the plaintiffs complain, is one that
18 is reminiscent of the discriminatory tax scheme that was once
19 in place.

20 MS. CALCATERRA: The alleged discriminatory tax
21 scheme. The consent order negotiated between all the parties
22 at that time, where the USDOJ and the U.S. Attorney General
23 intervened, it clearly said after two-and-a-half years after
24 litigation and discovery that the Court found no
25 discriminatory intents on behalf of --

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1 THE COURT: Intent is not the question, it's impact.
2 Because I could care less, personally, whether or not the
3 intent was to discriminate against all of these poor brown and
4 black people. My question is, is the tax scheme from 2010 to
5 2017 reminiscent of the one that has a discriminatory impact
6 of these poor folks of color.

7 MS. CALCATERRA: It is reminiscent of that.
8 However, what the plaintiffs are alleging is that because
9 people -- two classifications that they use. They use a white
10 census track and the non-white census track. According to the
11 census, the definition of a white census track is when more
12 than 50 percent of the home owners or residences there are
13 white. And they use the term minority census track for the
14 census track where over 50 percent of the residents there are
15 minorities as well.

16 But what we have in Nassau County is many people who
17 don't file for tax assessments. It's not just those in
18 minority census tracks. We have plenty of folks who don't
19 file minority census track. We have white homeowners living
20 in a white census track as well that don't file.

21 The disparity between those who are able to get
22 refunds is basically based upon who is filing and who is not
23 filing.

24 What we're doing is the defendants are actually
25 seeking to file a motion to dismiss that is based upon two

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1 threshold issue in Suffolk County jurisdiction. One which is
2 standing --

3 THE COURT: Let's do the other.

4 MS. CALCATERRA: Subject TIA.

5 THE COURT: Yes.

6 MS. CALCATERRA: All right. We believe the
7 complaint should be dismissed under Federal Rules of Civil
8 Procedure 12(b)(1) and 12(b)(6). Because, among other
9 reasons, this Court lacks facially related subject matter
10 jurisdiction over this action under the Tax Injunction Act.

11 And this Court actually dealt with a similar issue
12 in U.S. V. Nassau. What I'd like to do is walk the Court
13 through the history of the U.S. V. Nassau, Coleman case. This
14 is relevant, so I put together a timeline.

15 In October 1997 plaintiffs filed in state Court and
16 the ACLU represented them. The plaintiffs litigated this for
17 about two-and-a-half years.

18 THE COURT: You're talking about the 2000 suit.

19 MS. CALCATERRA: Yes, that resulted in the 2000
20 stipulation.

21 THE COURT: Uh-huh.

22 MS. CALCATERRA: Thank you. It was first filed
23 October 1997.

24 THE COURT: I see.

25 MS. CALCATERRA: They litigated through motion

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1 dismissal process, shared in discovery.

2 Then in June 14, 1999, the federal Government,
3 USDOJ, filed a case in federal court called U.S. V Nassau that
4 this Court entered a ruling on, that was based upon the fact
5 pattern that the plaintiffs alleged in the state decision,
6 which is Coleman. And then at that time, that was a 15 --
7 right after that was filed, then about six months later, the
8 State AG did not file a case. They just intervened on the
9 state case, which was approved.

10 And the Court ultimately made a decision in U.S. V
11 Nassau in March 2000, which again is a similar fact pattern
12 here, where they spent -- a 15-and-a-half page ruling -- the
13 Court spent most of the time discussing the TIA. It also said
14 that there is not an exception in TIA for Fair Housing
15 amendment claim. And specifically noted that in 1998 when the
16 Fair Housing Act was amended, Congress spent a lot of time
17 updating the Fair Housing Act. At that point they didn't make
18 an exception to the TIA.

19 Judge Spatt said that. And he also stated that in
20 the Supreme Court case, McNeer, a case brought on a tax
21 assessment. And the allegations in that particular case,
22 Section 1983, and the Supreme Court said that since state
23 courts have remedies and the TIA requires these type of cases
24 to be brought in Supreme Court, that even though it's a 1983
25 claim it should not be argued in federal court.

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1 So it's a similar fact pattern here. That's why
2 that particular decision is important to the relevance of
3 this.

4 Then right after the decision on that, which was
5 March 7, 2000, which denied the Department of Justice, or
6 dismissed it, dismissed the jurisdiction, USDOJ then
7 intervened on the case. Then everyone looked about that, was
8 sitting down, drafting the settlement, negotiating a
9 settlement either way, and that was entered March 2000.

10 This particular case with U.S. V. Nassau was
11 reiterated in the later case in this particular court, by the
12 same Judge Spatt in the matter of Miller, where the same
13 issues came up related to the TIA. So it was even mentioned
14 later.

15 The Miller case said as long as state provides
16 sufficient remedies, the taxpayer is prohibited from filing
17 suit in federal court. That case is in our letter, Miller V.
18 New York Division of Tax Appeals.

19 So the other issue that is related to subject matter
20 jurisdiction to the TIA also has to do with the issue of
21 comity. This Court again further lacks under the principals
22 of comity, which counsels federal courts to resist in engaging
23 in certain cases falling within their jurisdiction.

24 And in 2013 a case, 4K Group, which is also
25 referenced in our letter, was decided here in the Eastern

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1 District of New York that stated the premise that the
2 principal of comity is more abrasive than the TIA comity,
3 exercise of lower federal courts jurisdictions over tax
4 matters if the TIA cannot reach.

5 Basically what it was doing was reenforcing the fact
6 that this particular case should not be in federal court it
7 should be in state court. Interestingly enough, the
8 plaintiffs -- the Coleman stipulation over 70 times, they seem
9 to be very satisfied with the outcome of that case at the
10 time. And that was all decided in state Court. So there are
11 definitely state Court remedies that are efficient and speedy
12 for the plaintiffs. And so that's why we're seeking a motion
13 to dismiss, specifically focusing on the standing and the
14 subject matter jurisdiction issues.

15 But if this Court is going to dismiss the case, or
16 thinking towards dismissing it, we recommend to the plaintiffs
17 that consider withdrawing your complaint and filing it in
18 state Court, so at least we can continue litigating the case
19 to a resolution that would be best for all parties. Because
20 what we're doing is wasting also taxpayer money and resources
21 defending this case if it will be dismissed.

22 THE COURT: They are disproportionally using
23 taxpayer money, if I were to believe the complaint. Thank
24 you.

25 MS. CALCATERRA: You're welcome.

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1 THE COURT: I ask the defendants to focus on the
2 subject matter jurisdiction issue not arbitrarily.

3 My job at the point of a motion to dismiss is not to
4 question the allegations but to except them as true. If I
5 were accept these allegations as true, again I don't know if
6 they are true, if I were to accept the allegations as true,
7 I'll tell you this stinks. But the fact that I might think it
8 stinks doesn't mean that I have the ability to preside over
9 this matter.

10 To be candid, I believe that they have a persuasive
11 argument on subject matter jurisdiction. And short of the
12 last comment about the waste of taxpayer money, I do believe
13 the defendants' suggestion, if in fact they are correct on the
14 subject matter jurisdiction matter, that the plaintiffs pursue
15 this in state court so there can be a remedy to fix the
16 problem. If a problem is determined to actually exist, it
17 might be the most prudent course. Against that backdrop,
18 please proceed.

19 MR. McNEELA: Sure, your Honor. Let me see if I can
20 try to dispel any of the misgivings you might have about the
21 Court's jurisdiction to hear this case.

22 Very simply, I'll turn to the Tax Injunction Act
23 first. As the Court is aware, we seek in large part
24 class-wide damages. The Tax Injunction Act has nothing to do
25 with the assertion of monetary damages. Clearly those claims

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1 are not subject to an act that's focused exclusively on
2 injunctive relief.

3 With respect to the injunction that the plaintiffs
4 do bring, there was no discussion of the Supreme Court Hibbs
5 case, which post-dates the various decisions and Nassau County
6 decision that defense counsel mentioned.

7 In that case the Supreme Court made clear that the
8 Tax Injunction Act was primarily focused on actions where the
9 result of the injunction would be to prevent the municipality
10 from collecting the tax revenue it needs in order to fund its
11 operations. That's the whole point. We don't want challenges
12 where you have taxpayers who are trying to prevent the
13 municipality from funding its operations.

14 Here the injunctive relief that is sought would be
15 nothing. It wouldn't take away one dollar from the tax
16 revenue hall that Nassau County is seeking. We're seeking a
17 reapportionment on a non-discriminatory basis.

18 So the way it works there, as we note in the
19 complaint, is that the county sets a target, whether \$15
20 billion or \$5. Then based on that necessary budget
21 requirement, it goes out and apportions taxes. They can turn
22 around next year and say we need \$100 trillion. This lawsuit
23 will have nothing to do with that. It will not detract one
24 iota, not a single dollar.

25 In Hibbs you have a case, Supreme Court case, where

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1 there was an injunction sought with respect to a tax credit.
2 Another similarity there is that the tax credit involved a
3 religious institution, so subject to heightened scrutiny.
4 It's an implicated class, a protected class, which is also
5 implicated here. And the Court found that because the
6 injunctive relief that was sought was not going to detract
7 from the coffers of the municipality at issue, that that Tax
8 Injunction Act did not bar it.

9 THE COURT: Which?

10 MR. McNEELA: The Hibbs decision, your Honor.

11 Turning to the issue of comity. There is a Supreme
12 Court case that is instructive that both parties do cite, the
13 Levin case. What the Levin case held, is that the comity
14 concerns --

15 THE COURT: Hold on, I don't have Hibbs in my
16 binder. Kandice, print me Hibbs.

17 MR. McNEELA: With respect to comity, the Supreme
18 Court in 11 case noted that comity is appropriate. Because it
19 is a discretionary doctrine, it is not a requirement. It's
20 appropriate in certain circumstances.

21 What the Court noted is that comity concerns are
22 significantly less in cases where the claims assert racial
23 classifications, a protected class, which by definition are
24 subject to heightened scrutiny. Because the federal
25 Government's concern, in that regard in stamping out racial

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1 discrimination will be viewed as trumping the state's concern
2 at having the first crack at resolving primarily state issues.

3 That's what we have here. We do site to cases on a
4 motion to dismiss. We can marshal others showing that there
5 are cases that say that comity concerns are trumped by federal
6 court jurisdiction over matters involving racial
7 discrimination.

8 I would do want to bring up that notably the Coleman
9 case itself, the 1999 case, it held at that time that the
10 county was now on notice that its practices had discriminatory
11 impact. And it couldn't then in the future, to the extent it
12 revived these practices, claim it wasn't intentional
13 discrimination at that point. Because the Court gave them,
14 said you now know the outcome of what you're doing. If you do
15 it again, that's evidence of intentional discrimination.

16 THE COURT: But that doesn't go to the issue of
17 subject matter jurisdiction. Who resolves that issue of
18 discrimination, et cetera, is separate and apart from a
19 determination of whether the conduct was intentional or not.

20 MR. McNEELA: Sure, but I do want to be clear about
21 the terms that we're using. Comity is not a subject matter
22 jurisdictional concept; it's a matter of abstention.

23 There is no dispute that this matter has subject
24 matter jurisdiction over Fair Housing Act, Section 1983
25 claims. The issue is whether in the matter of Court's

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1 discretion --

2 THE COURT: I'm sorry, you had moved to the comity
3 argument. Go ahead.

4 MR. McNEELA: So whether in the Court's discretion
5 it should voluntarily abdicate the jurisdiction that's been
6 conferred upon it in order to honor the state's interest.

7 But as for pointing out, as this report said, when
8 you have a protected class the federal Government's interest
9 or federal court's judiciary interest in seeing that these
10 sort of racial disparate treatment of folks is being remedied
11 appropriately.

12 And quite frankly, rather than showing that the
13 state Court is an effective place to seek remedy, Coleman
14 shows the opposite. You had years and years of proceedings.
15 You had a consent decree that was entered into; soon after the
16 consent decree expires, the political winds change in Nassau
17 County. They go back, they reinstitute the exact same type of
18 policies that merited Coleman in the first place.

19 THE COURT: That wasn't by virtue of where the case
20 resided. That could have happen if a consent decree was
21 issued out of a federal court, and it expired a ten-year mark.

22 The consequence of someone wanting to go back once
23 they are not obligated to behave in a particular way under a
24 consent decree, I don't see how that in any way has any
25 bearing on which court the consent decree was ordered out of.

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1 MR. McNEELA: Your Honor, it doesn't, and let me
2 explain why.

3 It doesn't insofar as we're not indicating that the
4 state court is in any way impartial or unbiased or anything
5 like that. The point is that the federal Government's
6 interest in seeing that racial discriminatory practices are
7 stamped out is even more heightened here than normal given the
8 history of what is going on.

9 THE COURT: I get your point now. You're saying,
10 look, given their conduct, which you see is repeated and at
11 least intentional given the fact that they were on notice of
12 one Court's view of it, it is all the more reason why this
13 Court should not allow concerns of comity to prevent it from
14 moving point.

15 MR. McNEELA: That's how I should have put it.

16 THE COURT: It could have been me. It took me a
17 minute to get it. I got it.

18 MR. McNEELA: Then I would also note that the Levin
19 decision, which both parties discuss regarding comity, points
20 out too that comity is more appropriate in cases where they
21 involve commercial matters. Traditionally the states are
22 afforded wide latitude, commercial taxation matters within
23 their own geographical area, own competencies.

24 Here, this is not a commercial matter. So it's
25 another factor that Levin points out against comity or doesn't

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1 support comity. And that other courts, and again we can
2 marshal the authority in our opposition to motion to dismiss,
3 have relied upon, in addition to the racial classification
4 issue.

5 THE COURT: Do you see this case as
6 indistinguishable from the Bernard V. the Village of Spring
7 Value case decided by the Second Circuit in 1994?

8 MR. McNEELA: That's a good question, your Honor. I
9 unfortunately don't recall the Bernard case off the top of my
10 head. I will note that both predate Levin and Hibbs.

11 THE COURT: Fair enough.

12 MR. McNEELA: Which I believe are at least, if
13 not -- they are guide posts, if not the North Star how this
14 analysis should breakdown.

15 But again, both Hibbs was cited by Levin to support
16 the idea that racial classifications -- Levin sites Hibbs on
17 this point -- that classification subject to heightened
18 scrutiny, there can't be any dispute that discrimination based
19 on race is subject to heightened scrutiny, that those sort of
20 cases, the traditional factors that animate comity are far
21 weaker and really don't apply in those circumstances.

22 I can address the case your Honor raised in a
23 letter, if the Court would like.

24 THE COURT: No, it will come up in briefing. What
25 is the defendants' response to the Hibbs case?

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1 MS. CALCATERRA: The Hibbs case, actually we see
2 that as a favorable ruling. Because what the issue was there,
3 is there was a group of individuals that brought a lawsuit
4 against the state of Arizona.

5 THE COURT: Can you slow down just a bit.

6 MS. CALCATERRA: Yes, thank you for suggesting.

7 The case that was brought in the state of Arizona
8 based upon that tax credit, was based upon a law that about to
9 go into effect that would give individuals a tax credit if
10 they gave money to a not-for-profit entity and they ear-marked
11 that money to go to religious schools.

12 So someone would fill out their tax form and they
13 check the box off if they gave over \$500 to this group. And
14 even though this were giving it to a religious institution,
15 they were still going to get a tax credit for it.

16 What the Court said in Hibbs is that the TIA is
17 applicable when a Government issues a tax assessment, when
18 there is a certified assessment or certified tax that goes out
19 and they are relying upon that in their coffers, and then a
20 tax is levied, and somebody has to pay for it.

21 That is different than a tax credit. A tax credit
22 is someone -- in the Hibbs case it was a five-to-four decision
23 and Justice Ginsburg wrote the decision -- which says, the
24 distinction there is when someone applies for a tax credit or
25 the forms, they are the ones determining whether it's a tax

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1 credit. That is not something that it going to effect the
2 flow of revenues in Government; versus when a Government
3 entity sends out a tax bill and they are actually relying upon
4 that.

5 So that distinction was made here and made in Hibbs,
6 which directly applies to this case. Because in this
7 particular case, tax assessments are set out by Government
8 entities and they are relying upon that revenue to come in.

9 I do want to touch upon something that the plaintiff
10 said as far as this is not financially impacting the revenues
11 of Nassau County.

12 Nassau County has this unique burden, it's something
13 called the County Guarantee. What it says is that Nassau
14 County sends out tax assessment bills for one tax bill that
15 covers the taxes for all of the school districts, and
16 municipalities, and the towns, and the hamlets. So multiple
17 levels.

18 In Suffolk County, for example, there are ten towns
19 there. The towns are the ones who send out the bill. In
20 Nassau, the county sends out the bill.

21 There is a law called the County Guarantee that
22 applies to Nassau County that says, if they send out a tax
23 bill and they have to refund somebody for that tax bill, the
24 county cannot go back to the school districts, the hamlets,
25 the villages, or wherever the fire districts where this tax

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1 went and get money back. That the county is actually
2 responsible for the entire amount of that refund.

3 It's not as if they have \$1.7 billion sitting around
4 that the plaintiffs believe that the district
5 disproportionately applied, because they asked for \$1.7
6 billion in damages That money that they are saying that could
7 be transferred over to the plaintiffs to pay for the recover
8 in this, is actually going to have a significant impact upon
9 the cash flow of Nassau County.

10 THE COURT: Any time a county has to pay damages,
11 it's going to have an impact. I guess I'm not following your
12 argument as to why it is that it makes the plaintiffs'
13 argument with respect to the relief sought in this case and
14 its implication with respect to a taxation scheme. Yes, there
15 will be a consequence. Any time a county has to come up with
16 money from its budget to pay damages in any case, it has an
17 impact on its budget. That's effectively what you told me, it
18 will impact the budget.

19 MS. CALCATERRA: Yes, but it goes back to what Hibbs
20 stated, that the TIA requires that federal courts don't have
21 jurisdiction. If there are going to be changes in a
22 Government-issued tax assessment, which is what this is here,
23 and that those cases should be heard in state court. And that
24 particular Hibbs case that --

25 THE COURT: I have to stop you. I want to make sure

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1 I'm understanding.

2 You said those are straight damages, that's not a
3 change in the tax scheme, that might be damages that we would
4 receive because we're seeking certain damages not -- how about
5 you tell me.

6 MR. McNEELA: Sure, your Honor. I think there is
7 say confusion between what are monetary damages and then what
8 is prospective injunction relief.

9 We're not saying we should go into a time machine
10 and have a retroactive injunction, even if there was such a
11 thing possible in place. There was a wrong in the past --

12 THE COURT: Remedy it with money.

13 MR. McNEELA: Right. That's just a damages claim.

14 With respect to the injunctive relief, we're not
15 seeking any injunction right now. When the case is over,
16 going forward, all we're saying is there has to be a
17 non-discriminatory reapportionment of how the taxes are
18 collected. We don't care how much taxes you're charging as a
19 municipality, it has to be done in a fair, ethical and
20 non-discriminatory manner.

21 The past damages has nothing to do with the
22 prospective injunctive relief that is only what the tax
23 injunction cares about.

24 Thank you, your Honor.

25 THE COURT: Give me a second. By the way, I find

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1 this case fascinating. Give me a moment.

2 (Brief pause.)

3 THE COURT: I have a basic question to the
4 plaintiffs that I'd like for to you answer for me so that I
5 can, I think, have a better understanding.

6 Am I to understand that the county determines that
7 the amount of monies that it may need, that's a fixed amount,
8 and then based on assessments they determine from where they
9 get that monies from each individual property owner. So
10 you're saying, listen, I'm not asking you -- or, what we're
11 asking with respect to the injunction doesn't change the
12 overall assessment, in terms of the consequence to the county
13 in terms of monies it receives. I'm just saying that if you
14 have ten people and you have to determine from whom you
15 collect that same sum total, what we want you to do is require
16 them to move things around differently.

17 MR. McNEELA: That's correct, your Honor. That's
18 exactly what we're alleging.

19 THE COURT: I needed to take a minute to look
20 closely at Hibbs. It was a quick read, I have to admit.
21 There are some aspects that, I agree with the defendants, make
22 it distinguishable from this case. I think that what you
23 pointed out with respect to the assessment versus the credit
24 is an important one. However, there is also language in there
25 that talks about the definition of an assessment, which is

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1 also an important one.

2 I thought when I got on the bench today this was
3 going to be simple, I was going to tell you to move on. I do
4 want briefing on this. I'm not going to tell them to just
5 move on.

6 I am incredibly curious, intellectually, about the
7 issues that this case presents.

8 About this last question that I just asked you, what
9 is the consequence of that, right. Because on one hand the
10 plaintiffs are complaining of the tax assessment that is being
11 levied against them, right, which would make it look, I think,
12 like a case that is implicated by the TIA. But I see some
13 room for argument.

14 Out of curiosity, what is the defenses' argument --
15 I just for sake of argument, not as a suggestion to the
16 plaintiff in terms of the way they proceed. I want to
17 understand, if there was no injunctive relief but only damages
18 for what they believed was the constitutional harm, that
19 doesn't change your assessment of the impact of the TIA,
20 right?

21 MS. CALCATERRA: No, it doesn't, your Honor.

22 THE COURT: Because you're saying the monies
23 nonetheless, it's effectively a tax refund, is that what
24 you're saying?

25 MS. CALCATERRA: Yes.

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1 THE COURT: That would they typically go to a state
2 court and say I was over-taxed. But a tax refund, right, in
3 the classic sense says that under your scheme I was somehow
4 over-taxed so I'm due a refund based on the scheme.

5 But here they are saying the scheme is problematic
6 and discriminatory. So it's not a refund they are seeking,
7 it's damages for the constitutional harm which, is a little
8 different, isn't it? Did I get that right?

9 MR. McNEELA: Yes, your Honor.

10 We view the damages as just, it could be -- how they
11 fund, is their business. The idea is, I understand why, from
12 an advocate's perspective, they can do a number of things to
13 raise the money. We're not saying the monies from damages --
14 it's damages. It's not a pure refund case. Wherever they get
15 the money to pay, is their own business.

16 But they are trying, I would say, to shoe-horn what
17 is a damages case, or at least the damages claim, into the
18 TIA.

19 And the very reason why all these cases, your Honor,
20 talk about comity, is because they recognize that the Tax
21 Injunction Act is a very big stretch to say it say applies to
22 damages. A lot of times courts, I'll be honest, some say it
23 doesn't apply at all, some say we're going to avoid this
24 issue; in addition, to the fact that the damages claims the
25 Supreme Court has never spoken about directly, I believe the

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1 TIA. But as I pointed out, there are innumerable reasons why
2 comity would not preclude the damages claim here for those
3 reasons.

4 MS. CALCATERRA: Your Honor, I did want to mention
5 there was a case that was decided in 1989 by Judge Spatt in
6 this Court. It is the Long Island Lighting Company Local V.
7 Brookhaven. The Local's property was assessed, a nuclear
8 plant, they felt their assessment was discriminatory. A case
9 was brought in this case in this court. In that particular
10 case, Judge Spatt said, While TIA prevents federal courts from
11 giving injunctive relief or declaratory relief, it is the
12 principal of comity that prevents a taxpayer from seeking
13 damages.

14 So that seems to be directly in line with what
15 plaintiffs are trying to do in this particular case. There
16 could again be that issue related to subject matter
17 jurisdiction by way of damages.

18 THE COURT: I looked at your letter, both of them,
19 you cited a number of my colleagues in various cases, both in
20 the Eastern District of New York and the Northern District of
21 New York. I think the Coon case was the Northern District of
22 New York. I will look to those in briefing closely.

23 But I am also curious about what higher courts have
24 said. Because, obviously, I have the ability to disagree with
25 my colleagues; less so that of the Circuit. I am curious what

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1 the Second Circuit has said on these issues, to the extent
2 that they have.

3 And if we don't have authority in the Second Circuit
4 on some of these issues, I would be interested to know what
5 other circuits have said. This is not one -- the issues that
6 you all present to me, are not issues that could not have been
7 raised in other circuits.

8 MS. CALCATERRA: Understood. We'll be sure to
9 include that in our briefing.

10 MR. McNEELA: With the Court's indulgence, one last
11 quick point I wanted to raise. The comity issue, I'm not
12 going to belabor the points I already made, but there is one
13 additional factor I think is important. That is, comity to
14 the extent it is merited in any given case, turns on whether
15 the state remedy would be adequate. Now, Coleman was
16 previously cited as an example of -- Coleman was a case where
17 there was no monetary damages sought, purely injunctive
18 relief. We believe, there is a particular rule that we
19 believe raises serious questions about whether or not damages
20 could be sought on a class-wide basis, called the Government
21 Operations Rule. That rule generally precludes individuals
22 from banding together as a class to ask for damages when the
23 point of disagreement is the Government operation or
24 Government entity itself.

25 So I'm not saying -- the law is a little unclear

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1 whether it would apply here. It's out there, it's a rule
2 that's been invoked before. We will address it in the
3 briefing. But the point being, because of the way the taxes
4 are apportioned, because of the damages at issue, we think
5 they have to be sought on a class-wide basis. We think there
6 could be a serious impediment in doing so in state court,
7 which would render comity inappropriate.

8 THE COURT: It's interesting. The defendants have
9 raised the issue of damages, specifically as one implicating
10 comity in the last case that you cited. And now here the
11 plaintiffs say it is because of the damages that comity may
12 actually not prevent the Court from proceeding. It's
13 interesting.

14 MR. McNEELA: It would be an interesting twist.
15 Again, I don't want to call it the tail wagging the dog, I
16 believe there are for more poignant issues that prevent
17 comity. But it is an issue that we think also is relevant as
18 a consideration.

19 THE COURT: In terms of the plaintiffs' arguments
20 concerning the fairly unique history of this case, not the one
21 specifically brought here but in light of the prior
22 proceedings, in light of the fact that there was a consent
23 order that was entered, that that consent order, the terms of
24 that remedied the discriminatory impact of the scheme, then
25 the reversion back -- which is where I started when I got on

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1 the bench -- to a scheme that is reminiscent of the very
2 scheme that was deemed discriminatory. And that the parties
3 over many years, at taxpayers' expense, worked to resolve. I
4 mean, that argument resonates with me. What do you say about
5 that?

6 MS. CALCATERRA: I understand, your Honor. The
7 policies that were put in place by the prior administration,
8 which is what triggered this particular thing, can be
9 explained as both the freeze policy and settlement policy.
10 What they intended to do is change what they allege was --

11 THE COURT: Who is the "they?"

12 MS. CALCATERRA: The defendants. The defendants at
13 that time who are in office were attempting to, wanted to
14 change what they deemed to be a broken assessment system. And
15 they put these two policies in place, which ultimately did
16 revert it back.

17 THE COURT: Right, revert it back to a scheme that
18 the county was on full notice was problematic and problematic
19 in terms of discriminatory impact. I understand that's what
20 they want to do. That's the problem. That's the problem that
21 the plaintiff is identifying, that that's what they wanted to
22 do; discrimination be damned is effectively the way it seems.
23 It doesn't like you're disagreeing with that.

24 Your colleague is like, really, oh, really don't say
25 yes to that.

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1 MS. CALCATERRA: No, understanding how Government
2 works and different administrations. What happened with the
3 Coleman stipulation and that agreement, and then you have a
4 new administration that comes in about ten years later, they
5 may not have been aware of it, may not have focused on it.

6 THE COURT: That's a bad argument.

7 MS. CALCATERRA: No, but it's true. With the
8 transition of different Governments --

9 THE COURT: Then --

10 MS. CALCATERRA: And --

11 THE COURT: Stop for a second. It just reenforces
12 the argument that the plaintiff is making, that we could end
13 up here over and over and over again.

14 If on the one hand the argument is they didn't care
15 about the discriminatory impact, although a prior court had
16 determined that the tax scheme in fact had a discriminatory
17 impact. Or they were too ignorant, in the literal sense, as
18 they proceed to be able to protect against an unintentional
19 reversion back.

20 It's not a good answer on it in terms of the problem
21 that the plaintiff identifies of, listen, we've been here,
22 there was a determination, yet we are still here again.
23 Either still here again because they don't care; or because,
24 as you say, they didn't know, so they were ignorant. But
25 their ignorance doesn't excuse it. It doesn't change what

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1 seems to be a real problem.

2 I don't know what that means in terms of comity I
3 haven't. It's got to be briefed.

4 But I will tell you, when you do brief it,
5 understand that I believe that there was something persuasive
6 about the argument that the plaintiff made in that regard. I
7 want to have these motions so people know where my concerns
8 are.

9 I hope that the plaintiffs can see where my concerns
10 are with respect to subject matter jurisdiction. As I said, I
11 got on the bench expecting that I was going to tell you, you
12 should really refile in state court, save everybody time and
13 energy. But I don't know if I agree that on the facts, the
14 unique facts, of this case that comity would be the obstacle
15 that the defendants argue that it is, on the unique facts of
16 this case. I believe the facts here are unique.

17 MS. CALCATERRA: Understood. And we will brief it
18 in our motion papers.

19 But now that you brought up motion papers, we had an
20 earlier discussion of several weeks ago hoping for the
21 opportunity that we could get more pages to respond.

22 THE COURT: You know what I normally say no to that
23 request because I typically believe that people just fill up
24 pages necessarily. I'll give you more pages, but understand I
25 like concise and cogent arguments. When people start rambling

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1 on, I stop paying attention. So it doesn't help you. If you
2 want the extra pages, I'll give them to you. Use them wisely.
3 How many more are you asking for?

4 MS. CALCATERRA: Up to 40.

5 THE COURT: Lord have mercy. Forty each.

6 MS. CALCATERRA: We've got TIA. We have standing.
7 We have underlying factual allegations. And you want to be
8 well-briefed in it. We will be concise.

9 THE COURT: You agree you need that many pages?

10 MR. McNEELA: I do. I think the issues are very
11 interesting, as the Court mentioned intellectually. I think
12 they could be a little thorny. I think there is interesting
13 authority on both sides that are cited and analyzed. I think
14 that number of pages are appropriate given the issues at hand.
15 I don't want to take the Court's time with this, but obviously
16 the reply brief would not be 40 pages.

17 THE COURT: No, it wouldn't.

18 MR. McNEELA: Would the Court prefer us to, with the
19 Court's permission, submit a pro-stipulation including the
20 timing of when the briefing would occur. I do know that right
21 now, I don't know how long the defendants need, I know they've
22 had the complaint for a long time.

23 THE COURT: I typically set the briefing schedule
24 out now. Let's do it.

25 What do you need? I've given you more time -- I've

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1 given you more pages. If I'm going to give you more pages
2 what I expect well-written submissions.

3 MS. CALCATERRA: Three weeks.

4 THE COURT: All right.

5 MS. CALCATERRA: Because plaintiffs are correct,
6 we've had it for a while. We've been working on the draft.
7 It exceeds 40 now, so we know what our goal is.

8 THE COURT: Opposition.

9 MR. McNEELA: I'd have to ask at least 45 days. As
10 far as their letter did an excellent job putting forth the
11 arguments, it obviously held some back. Given the time.

12 THE COURT: Do you have a problem with that?

13 MS. CALCATERRA: Giving them 45 days to respond to
14 ours? No.

15 THE COURT: Okay.

16 MR. McNEELA: Thank you.

17 THE COURT: Let's count that out.

18 COURTROOM DEPUTY: October 3rd for defense
19 paperwork, and November 14.

20 THE COURT: Does that sound right?

21 MR. McNEELA: Yes.

22 THE COURT: Two weeks on reply.

23 MS. CALCATERRA: Yes.

24 COURTROOM DEPUTY: November 28 for reply.

25 THE COURT: That's around Thanksgiving.

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1 MR. McNEELA: That is Thanksgiving.

2 THE COURT: Go to the following week.

3 COURTROOM DEPUTY: December.

4 THE COURT: An extra week from whatever that
5 Thursday is.

6 COURTROOM DEPUTY: December 5.

7 THE COURT: That makes more sense. Those are reply
8 dates. Fifteen pages on a reply.

9 Can I just tell you some pet peeves of mine. Don't
10 cite cases without a parenthetical. If I don't have an idea
11 why you cite a case, it will irritate me. I guess that's it.

12 You guys know what I care about. I think some of
13 the other issues that were raised are less problematic for me.
14 I'm going to be honest, I didn't think that your standing
15 argument was persuasive. Again, I'm here for it, I'll read
16 it. The comity issue and the subject matter jurisdiction
17 issue. There was another though, am I missing one?

18 MR. McNEELA: And standing.

19 THE COURT: That was it. Please don't spend forever
20 on standing.

21 MS. CALCATERRA: We did reserve an opportunity to
22 respond to the factual allegations as well.

23 THE COURT: Responding to the factual allegations
24 for the purposes of -- I'm going to accept them as true.
25 Except for the subject matter jurisdiction issue, on that I

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1 don't have to.

2 MS. CALCATERRA: That's helpful, your Honor. Thank
3 you.

4 THE COURT: For the rest of it, I've got it.

5 Obviously for subject matter jurisdiction, I'm
6 curious what is it that you are disagreeing? Much of what you
7 said here today sounded like you weren't in that much
8 disagreement about it, at least the background of the facts
9 here.

10 MS. CALCATERRA: The way that the complaint is
11 drafted is that it was intentional discrimination and the
12 county went out of their way to try to prevent people who live
13 within minority districts from filing their tax appeals.
14 That's not true. Because there were community forms,
15 educational opportunities they had. Many people did file for
16 tax appeals, specifically the Village of Hempstead, where the
17 three plaintiffs reside.

18 And so they laid out this out with such intent and
19 obstruction by the county that was specifically targeted
20 towards minority communities, when you have plenty of people
21 who live in white census tracks. I wanted to flush out a
22 little bit I felt as if --

23 THE COURT: Out of curiosity, putting aside any
24 allegations concerning obstructionist conduct by the county to
25 prevent people of color from making tax appeals, if we're just

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1 talking about the tax scheme by itself, and we talk about the
2 history of this case, which again I deem to be unique, does it
3 even matter, right? That's kind of like the alleged
4 obstruction conduct is almost belt and suspenders to the
5 issues of intent, as I see it, as based on the prior case, the
6 prior consent order.

7 You say this administration may not have known.
8 Again, I don't really think that is a persuasive argument. It
9 almost seems to me that I can stop right there and never even
10 get to whether or not there were additional obstruction.

11 You can disagree with that, and I could say okay
12 that didn't happen. But we know the other part did. We know
13 the consent decree was issued. We know the subsequent
14 administration reverted back to, I said to the scheme that was
15 reminiscent because I don't know how identical, but
16 reminiscent of the discriminatory issues. Those are the
17 salient facts. So don't spend too long is my point.

18 MS. CALCATERRA: Understood.

19 THE COURT: And you don't spend too long on that
20 either.

21 MR. McNEELA: Yes, Judge.

22 THE COURT: This has been helpful. I would like to
23 tell you I do appreciate your presentation here today.
24 Clearly you all came prepared to educate me on issues that I
25 had not been presented with before. I hope that you continue

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1 to do so in your submissions.

2 MS. CALCATERRA: Thank you, your Honor.

3 MR. McNEELA: Thank you.

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5 (Whereupon, the proceedings concluded.)

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